87-787

No. _____

In the Supreme Court of the United States

October Term, 1987

UNIVERSITY OF PITTSBURGH,
Petitioner,

v.

MATTHEW E. JACKSON, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

May a plaintiff in an employment discrimination case survive a motion for summary judgment merely by contesting the employer's legitimate, nondiscriminatory reason for terminating his employment—without presenting any direct or indirect evidence linking his discharge to his race—despite the holdings of four other courts of appeals that, in employment discrimination cases, there must be a causal nexus between the employment decision and the alleged basis of the discrimination?

LIST OF PARTIES

The caption of the case contains the names of all remaining parties in this action. Two additional parties, University officials Wesley W. Posvar and David C. Sullivan, were defendants in the district court and parties on appeal. The district court's grant of summary judgment in favor of these two individuals was affirmed by the court of appeals. Thus, they are no longer parties in this action.

Petitioner, the University of Pittsburgh, has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

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Petitioner, the University of Pittsburgh ("University"), respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on August 19, 1987.

OPINIONS BELOW

The August 19, 1987 Judgment and Opinion of the United States Court of Appeals for the Third Circuit ("Third Circuit"), which is reported at 826 F.2d 230 (3d Cir. 1987), is reprinted in Appendix A hereto at 1a, *infra.*

The June 11, 1986 Judgment of the United States District Court for the Western District of Pennsylvania

granting summary judgment in favor of all defendants, which is not officially reported, is reprinted in Appendix B hereto at 17a, *infra*.

JURISDICTIONAL STATEMENT

The Third Circuit entered its Judgment on August 19, 1987. Its decision is in direct conflict with decisions of at least four other United States courts of appeals concerning the evidentiary burdens under anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"). This Court has jurisdiction to review the Judgment pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides in relevant part:

> All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . .

Title VII provides in relevant part:

> It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . because of such individual's race . . . .

42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

In 1982, the University appointed a blue ribbon committee to review and to evaluate its in-house legal department. Following its review and evaluation, the committee recommended that the University develop a centralized,

well-structured office of legal services that was qualified to deal with a broad range of legal matters akin to those dealt with in a large corporate environment. After a nationwide search, the University hired David C. Sullivan as University Counsel, effective January 3, 1983, to carry out the committee's recommendations.

Upon his arrival at the University, Mr. Sullivan inherited a professional staff of two lawyers, one of whom was the Respondent, Matthew E. Jackson, Jr. ("Jackson"). After observing and evaluating the job performance of those two attorneys, Mr. Sullivan determined that Jackson, unlike the University's other Assistant University Counsel, had a number of performance problems.[1] Jackson's performance deficiencies were highlighted by complaints Mr. Sullivan received from Jackson's clients at the University as well as other third-party communications which were critical of Jackson's performance. For example, one client asked Mr. Sullivan to remove Jackson from its matters because of his failure to service them skillfully and promptly:

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[1]The record before the District Court and the Third Circuit contains an abundance of evidence that Jackson's performance as an in-house attorney for the University suffered from at least the following deficiencies: (1) inability to organize his work; (2) failure to complete his work in a timely fashion and to meet deadlines; (3) procrastination which transformed routine tasks into crisis situations; (4) failure to pay careful attention to detail in the preparation and review of documents; (5) unsatisfactory drafting skills; (6) failure to keep the necessary persons informed as to the status and progress of projects; (7) failure to perform and/or to complete all necessary and essential tasks in connection with projects; (8) failure to exercise sound judgment in connection with matters on which he was working; (9) inability to comprehend and to handle complex legal matters and transactions; (10) lack of punctuality and reliability; (11) failure to make suitable arrangements for coverage in his absence; and (12) lack of initiative.

> Matt Jackson simply is not meeting our requirements for legal support in the operations of the Foundation for Applied Science and Technology. This letter requests immediate relief in the form of temporary retention of outside counsel knowledgeable in securities law and long-term relief in the form of assignment to us of counsel capable of handling our affairs more promptly and skillfully.

The letter went on to complain about Jackson's work on a specific project as follows:

> The errors in documentation prepared by Matt for the Hickey-Kober Partnership were numerous and potentially disastrous in consequence . . . [Matt Jackson's] errors of omission and commission of the past week will cost us over $2 million in lost revenues if not corrected immediately.[2]

In late March 1983, Mr. Sullivan had begun to document the various problems that Jackson was having in performing his duties as Assistant University Counsel. On August 15, 1983, Mr. Sullivan sent to Jackson a memorandum outlining his performance problems. Mr. Sullivan also conducted numerous counseling sessions with Jackson and decreased Jackson's work load by assigning matters to outside counsel. Nevertheless, Jackson's performance did not improve to a satisfactory level.

On January 3, 1984, Mr. Sullivan terminated Jackson's employment with the University. Mr. Sullivan replaced Jackson with another black lawyer, Ms. Mary Kennard, who came to the University highly recommended from a position with the National Association of College and University Attorneys.

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[2]This letter is reprinted in Appendix C at 20a, *infra*.

Jackson commenced this suit in the United States District Court for the Western District of Pennsylvania on February 1, 1985.[3] The University sought summary judgment on the race discrimination claim concerning Jackson's discharge because (1) Jackson had failed to establish a *prima facie* case under the standard enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*"); (2) the discharge was motivated by lawful reasons, *i.e.*, Jackson's poor performance; and (3) Jackson had not produced direct or indirect evidence to link his discharge to race. For these reasons, the University urged that it was entitled to summary judgment because there was no genuine issue of material fact.[4] Jackson argued that summary judgment was not appropriate because his deposition testimony challenged the University's articulated reasons for his discharge.

In granting the University's motion for summary judgment, the district court did not address whether Jackson had established a *prima facie* case. Rather, because the University had articulated a legitimate, nondiscriminatory reason for Jackson's discharge, the district court focused its opinion on the third prong of *McDonnell Douglas/Burdine*

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[3]In addition to a race discrimination claim under Title VII and 42 U.S.C. § 1981 against the University concerning his discharge, Jackson's Complaint also contained a number of federal and state law causes of action against two University officials and the University. The Third Circuit affirmed the district court's grant of summary judgment concerning those additional causes of action. Thus, the additional causes of action are not at issue, and will not be addressed, herein.

[4]Jackson also filed a motion for summary judgment, which was denied by the district court. Appendix B at 19a, *aff'd*, Appendix A at 7a-8a n.2.

allocation of proof, *i.e.*, whether the University's articulated reason was "a pretext for discrimination."[5] *See United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983).

The district court concluded that Jackson's record evidence did not create a genuine issue concerning whether the University's articulated reason for discharging Jackson was a pretext for discrimination, finding

> no evidence of racial animus but on the contrary noting abundant instances of unsatisfactory work performance which plaintiff's supervisor Sullivan might reasonably regard as sufficient cause for discharge . . . .

Appendix B at 18a.

On appeal, the Third Circuit reversed the district court's grant of summary judgment on Jackson's discharge claim against the University. In so doing, the Third Circuit framed the issue before it as follows:

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[5]In *McDonnell Douglas*, and then again in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) *("Burdine")*, this Court set forth the basic allocations and order of presentation of proof in discrimination cases:

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. *Burdine*, 450 U.S. at 252-53 (citations omitted) (quoting *McDonnell Douglas*, 411 U.S. at 802 and 804).

> The true dispute in this appeal concerns the third stage of the *McDonnell Douglas* method of proof: Has Jackson introduced sufficient evidence to demonstrate the existence of a genuine issue whether [the University's] "proffered justification is merely a pretext for discrimination"?

Appendix A at 8a (quotation in original).

Applying its new "*Chipollini*" standard which allows a plaintiff in a discrimination case to survive summary judgment "without presenting evidence specifically relating to" race,[6] the Third Circuit held that, by contesting the University's evaluation of his job performance, Jackson had properly created a genuine and material issue for trial:

> [T]hroughout nearly 700 transcript pages, Jackson's deposition in numerous ways calls into question [the University's] claims that Jackson was dismissed for performance deficiencies. Jackson's basic position is that he never received any complaints about—and, indeed, that he was often complimented for—his legal work during his years at Pitt... [Such record evidence] suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he was black.

Appendix A at 8a-9a.[7]

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[6]In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3d Cir.) (en banc), *cert. dismissed*, 56 U.S.L.W. 3183 (1987), the Third Circuit held that "a plaintiff can prevail [at the summary judgment stage in an age discrimination case] by means of indirect proof that the employer's reasons are pretextual *without presenting evidence specifically relating to age*." 814 F.2d at 898 (emphasis added).

[7]In his deposition testimony, Jackson challenged the University's articulated reason for his discharge by asserting, among other things, that Mr. Sullivan "never made specific complaints" about his work and that "he was not the lawyer who was responsible for some of the matters in question." *See* Appendix A at 8a-9a.

Thus, the Third Circuit held that the University was not entitled to summary judgment on Jackson's race discrimination claim even though Jackson produced no evidence linking his discharge to race. In fact, the only evidence Jackson produced relating to race was his *prima facie* case, i.e., he is black and the other Assistant University Counsel who was not discharged is white.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Standard Concerning The Evidentiary Burdens At The Summary Judgment Stage In Discrimination Cases Conflicts With That Of At Least Four Other Courts Of Appeals.

This Court should issue a Writ of Certiorari because a conflict exists between the Third Circuit and at least four other courts of appeals concerning a critically important issue of law: In order to survive summary judgment in a discrimination case in which the employer has articulated a legitimate, nondiscriminatory reason for its action, must a plaintiff offer evidence which links the adverse employment action and the alleged discriminatory basis for it, or may the plaintiff simply attack the proffered reason?

The Third Circuit has held that no nexus need be shown. In contrast, four other courts of appeals have interpreted this Court's statements in *McDonnell Douglas* and *Burdine* as requiring a showing of a discriminatory nexus.

The Third Circuit's decision does not follow this Court's instruction that, under the third stage of the *McDonnell Douglas/Burdine* method of proof, a plaintiff is required to prove that the legitimate, nondiscriminatory reasons articulated by the defendant "were a pretext *for*

discrimination." *Burdine*, 450 U.S. at 253 (emphasis added).

Certiorari should be granted in this case to correct this conflict between the Third Circuit and the other courts of appeals. Otherwise, the Third Circuit's radical change in the evidentiary standards for discrimination cases may affect the outcome of the thousands of employment-related civil rights cases filed each year in the federal courts.[8]

In resolving this conflict, this Court should reject the Third Circuit's standard, not only because it conflicts with the way four other courts of appeals have applied decisions of this Court, but also for three additional reasons:

(1) The Third Circuit's holding applies *Burdine* incorrectly by improperly shifting the plaintiff's burden of persuasion to the defendant at a critically important time in the lawsuit;

(2) The Third Circuit's approach essentially eliminates an employer's opportunity to obtain summary judgment in discrimination cases, contrary to this Court's instruction in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986); and

(3) The Third Circuit's approach eliminates the necessity of race-related evidence in a race discrimination case.

The Third Circuit's holding in this case directly conflicts with the decisions from the United States Courts of

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[8]Over 9,100 employment-related civil rights cases were filed in fiscal 1986. Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts (1986), Table C-2 at 176 and Table C-2A at 179.

Appeals for the First,[9] Fifth,[10] Seventh,[11] and Eleventh[12] Circuits. Unlike the Third Circuit, these other courts have held that a plaintiff cannot survive summary judgment (or meet his ultimate burden to demonstrate unlawful discrimination) merely by introducing evidence which controverts the truthfulness of the employer's articulated reasons for the disputed employment decision. Instead, these other courts of appeals require a plaintiff to link the employment action at issue with the alleged basis of the discrimination claim. In short, they require a discrimination plaintiff to offer proof that the employer's proffered explanation was "a pretext for discrimination," not just that it was not true.

For example, in *Dea v. Look*, 810 F.2d 12 (1st Cir. 1987), the First Circuit affirmed summary judgment for the employer, despite the plaintiff's attempts to discredit the employer's articulated reason for the discharge. The court noted that the plaintiff's challenge to the employer's stated justification "merely provide[s] another reason, totally unrelated to age, for his discharge." *Id.* at 15. The First Circuit held that

> evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question.

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[9]*Dea v. Look*, 810 F.2d 12 (1st Cir. 1987); *White v. Vathally*, 732 F.2d 1037 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984).

[10]*Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986).

[11]*Dale v. Chicago Tribune Co.*, 797 F.2d 458 (7th Cir. 1986), *cert. denied*, __ U.S.__, 107 S.Ct. 954 (1987); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir. 1987).

[12]*Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525 (11th Cir. 1983).

> Plaintiff continues to carry the burden of showing discriminatory intent, and . . . [he] cannot meet his burden of proving "pretext" simply by refuting or questioning the defendants' articulated reason.

Id. (citations omitted). *See also White v. Vathally,* 732 F.2d 1037, 1043 (1st Cir.), *cert. denied,* 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent").

Similarly, the Seventh Circuit in *Dale v. Chicago Tribune Co.,* 797 F.2d 458 (7th Cir. 1986), *cert. denied,* __ U.S. __, 107 S.Ct. 954 (1987), affirmed summary judgment for an employer which had proffered a nondiscriminatory explanation for a discharge. The Seventh Circuit held that a plaintiff "must establish a nexus" between the evidence which purported to show that the employer's explanation was unworthy of credence and age discrimination. *Id.* at 465. Since the plaintiff's evidence in *Dale* did not relate even indirectly to age, and consisted principally of "self-interested assertions" which challenged the prudent business judgment of his supervisors, summary judgment was found to be appropriate. *Id.* at 464-65. *See also Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 559 (7th Cir. 1987) (summarizing the law in the Seventh Circuit as requiring a plaintiff to "show not only a false reason but also a causal chain in which race or another forbidden criterion plays a dispositive role").

The Third Circuit's standard is also in conflict with decisions in at least two other circuits. *See Slaughter v. Allstate Ins. Co.,* 803 F.2d 857, 860 (5th Cir. 1986) (when resisting a summary judgment motion, conclusory allegations by the plaintiff, without more, are insufficient to carry the plaintiff's burden to show that the articulated

reasons served "as a pretext to cloak discrimination"); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983) ("a simple finding that the defendant did not truly rely on its proffered reason, without a further finding that the defendant relied instead on race, will not suffice to establish Title VII liability").

Had this case arisen in one of these other four circuits, instead of in the Third Circuit, the result surely would have been different. Like plaintiffs in cases in these other circuits, Jackson's only racially related evidence was that he is black. The balance of his record evidence is "self-interested assertions" challenging his supervisor's judgment and evaluations of his job performance. In this factual setting, it was the Third Circuit's use of the wrong summary judgment standard which led it to issue a holding squarely contrary to the result which would have been reached under the approach used in the four other circuits.

The appropriate standard for summary judgment in discrimination cases is an important issue, as this case illustrates, and it affects thousands of cases per year. It, therefore, would be appropriate for this Court to issue a Writ of Certiorari to resolve the conflict among the circuits on this important issue.

A. *The Third Circuit's Standard Improperly Shifts The Burden Of Persuasion In Discrimination Cases From The Plaintiff To The Defendant.*

Summary judgment is appropriate if the evidence of record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). As this Court emphasized last year in its trilogy of cases examining the burdens of proof and persuasion in summary judgment

proceedings,[13] no genuine issue of material fact remains for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2511 (1986).

This Court explained that a judge ruling on a summary judgment motion must "view the evidence presented through the prism of the substantive evidentiary burden" that the parties must bear at trial. *Anderson*, 106 S.Ct. at 2513. Thus, if the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden at trial. *See Celotex Corp. v. Catrett*, 106 S.Ct. at 2555.

In a discrimination action, the plaintiff has the burden of persuasion on the issue of discriminatory intent (for example, in this case, the plaintiff must prove that the decision to discharge him was the result of intentional racial bias). *Burdine*, 450 U.S. at 253. Furthermore, at the third stage of the *McDonnell Douglas/Burdine* analysis, the plaintiff must persuade the trier of fact that the defendant's proffered explanation is a "pretext for discrimination." *Id.* Thus, it is the plaintiff who must prove discrimination; the defendant is not required to prove the absence thereof. *Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) (per curiam).

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[13] *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548.

The Third Circuit, however, permits a plaintiff to defeat an otherwise meritorious motion for summary judgment simply by disputing the legitimate, nondiscriminatory reasons proffered by the employer for its actions. The Third Circuit does not require a plaintiff to produce any evidence linking the employment decision at issue to the basis for the discrimination claim. By adopting this standard, the Third Circuit has effectively and impermissibly shifted the burden of persuasion from the plaintiff to the defendant, in clear violation of this Court's holding in *Burdine*.

The effect of this improper shifting of the burden of persuasion on the outcome of discrimination cases is to change the nature of the anti-discrimination statutes. An employer motivated by unpublicized financial problems, a desire to spare the feelings of a loyal or long-term employee, or even nepotism may communicate to a discharged employee an explanation for the decision which is less than brutally frank, even if well intentioned. Under such circumstances, the employer has committed no illegal act under any of the civil rights statutes. Nevertheless, if the employer had explained the discharge as being based upon poor job performance, and if the employee were to allege reasons why he believed that his job performance was not substandard, the plaintiff (in the Third Circuit) could survive summary judgment (assuming an ability to meet the light burden of proving a *prima facie* case) and proceed to trial on a claim of race discrimination, sex discrimination, age discrimination, or all three. The case would proceed to trial (in the Third Circuit) even though there is no evidence that the employee's race, sex or age was a reason for his discharge.

In attempting to minimize the significance of its approach, the Third Circuit offered this advice: "A defendant which is less than honest in proffering its reason for discharge risks an unnecessary age discrimination verdict." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d at 899. This advice protests too much because it *admits* that the Third Circuit's approach has the effect of turning federal anti-discrimination statutes into federal codes of good faith and fair dealing. These laws, however, were drafted to prevent discrimination, *Burdine*, 450 U.S. at 259, not to punish employers for not being brutally frank to their employees. Thus, as the Third Circuit itself seems to recognize, its new standard has the result of giving the anti-discrimination laws an effect which was not intended by Congress. This Court, therefore, should issue a Writ of Certiorari to review the Third Circuit standard and to restore the original intent of the anti-discrimination laws.

B. *The Third Circuit's Standard Places Such A Light Burden On A Discrimination Plaintiff That It Essentially Eliminates Summary Judgment For Employers In Discrimination Cases.*

Under the Third Circuit standard, a discrimination plaintiff can survive a motion for summary judgment so easily that summary judgment is essentially eliminated for defendants in employment discrimination cases. As long as the plaintiff raises a factual dispute concerning the employer's proffered reasons, summary judgment would not be appropriate, according to the Third Circuit.

In the instant case, the Third Circuit overturned the district court's grant of summary judgment because Jackson, in his deposition, tendered self-serving statements which disputed the University's evaluation of his job performance. None of Jackson's evidence, however, linked his

discharge to race, either directly or indirectly. He was merely second guessing his employer's evaluation of his work.

The effect of this decision is to permit *every* plaintiff who is discharged for poor performance, and who brings a discrimination action, to avoid summary judgment merely by challenging his employer's assessment of his job performance. This rule stands in clear conflict to the proposition that Title VII "was not intended to 'diminish traditional management perogatives.'" *Burdine*, 450 U.S. at 259 (quotation in original).

More importantly, the Third Circuit's approach effectively eliminates summary judgment in discrimination cases. This result stands in stark contravention to this Court's recent reaffirmation that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 106 S.Ct. at 2555 (quotation in original).

A Writ of Certiorari, therefore, should be granted in this case so that summary judgment can be returned to its integral role in the Federal Rules in discrimination cases arising in the Third Circuit, as well as in ones arising elsewhere in the country.

C. *The Third Circuit's Standard Eliminates The Necessity For Race-Related Evidence In Race Discrimination Cases.*

Under the standard which the Third Circuit applied in this case, a race discrimination plaintiff can avoid summary judgment, can plead his case to the jury and can

ultimately prevail without providing any direct or indirect evidence linking the adverse job action at issue to his race. Instead, a plaintiff in the Third Circuit can secure a favorable verdict merely by raising a factual dispute about the employer's stated nondiscriminatory reasons for an employment decision.

Federal anti-discrimination statutes, however, including Title VII, do *not* impose (and were never intended to impose) upon employers the burden of establishing a just or proper cause for their personnel actions. Rather, they are statutes which were enacted to remedy only a certain narrowly-defined type of employment decisions—ones which are based upon a statutorily-prohibited reason (such as race, age, or sex).

In these discrimination cases, it is critical that the plaintiff prove not only that something adverse happened to him, but also that it happened to him *because of* his race, age, or sex. This Court acknowledged the importance of this nexus in *Burdine*, as have four other courts of appeals which have addressed the issue.

The Third Circuit, however, has adopted an approach which incorrectly eliminates the proof of race discrimination from a race discrimination case. This error is so important that intervention by this Court is appropriate.

For these and the other reasons set forth above, this Court should grant the petition, issue a Writ of Certiorari, reverse the Third Circuit, and reiterate that a plaintiff in a discrimination case must produce more than a factual dispute with his employer's articulated reasons for a job action in order to survive summary judgment. Instead, such a plaintiff must establish some nexus between the

employment action at issue and the alleged basis of discrimination, as four other courts of appeals which have addressed this issue have held.

CONCLUSION

In order to resolve this conflict between the Third Circuit and four other courts of appeals, and for all of the other foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: November 13, 1987

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 86-3391

MATTHEW E. JACKSON, JR.,

Appellant

v.

UNIVERSITY OF PITTSBURGH, DAVID C. SULLIVAN and WESLEY W. POSVAR, in their official and individual capacities

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. CIVIL ACTION NO. 85-264)

Argued
February 11, 1987

Before: HIGGINBOTHAM and STAPLETON, *Circuit Judges,* and RODRIGUEZ, *District Judge.**

(Filed August 19, 1987)

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* Honorable Joseph H. Rodriguez, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge.*

This appeal requires us to determine whether summary judgment was properly granted for the defendants-appellees in an employment discrimination case. Because record evidence demonstrates the existence of genuine issues of material fact that must be resolved at trial, we determine that, in part, it was not properly granted. We therefore will reverse the judgment of the district court on appellant's federal claims concerning his discharge and remand them for trial.

I. Background

Appellant Matthew E. Jackson, Jr., who is black, was hired on July 15, 1975 by appellee the University of Pittsburgh ("Pitt") to work as an attorney in its legal department, Jackson continued in this position until January 3,

1984, when he was discharged by appellee David C. Sullivan, who had then been Pitt's general counsel, and Jackson's supervisor, for one year. Jackson thereafter filed an internal grievance with Pitt concerning his termination; he also complained to the Pennsylvania Human Relations Commission ("PHRC"), the Equal Employment Opportunity Commission ("EEOC") and the Office of Federal Contract Compliance Programs ("OFCCP"), that his discharge was racially motivated.[1] On February 1, 1985, Jackson commenced this action, alleging federal claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2 (1982), and Section 1981 of the Civil Rights Act of 1866 and the Voting Rights Act of 1870, 42 U.S.C. § 1981 (1982), and pendent state claims. After discovery and a hearing, the district court denied Jackson's motion for summary judgment and entered summary judgment for appellees. *Jackson v. University of Pittsburgh,* No. 85-0264 (W.D. Pa. June 11, 1986). This appeal followed. Our jurisdiction is conferred by 28 U.S.C. § 1291 (1982).

II. The Governing Law

We review grants and denials of summary judgment by applying the same test a district court should employ. *Marek v. Marpan Two, Inc.,* 817 F.2d 242, 244 (3d Cir. 1987); *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977); *see generally Bushman v. Halm,* 798 F.2d 651, 656-57 (3d Cir.

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[1]On December 20, 1984, the OFCCP concluded that "[n]o elements of race consideration were found in complainant's termination." Appendix for Appellant ("App.") at 838. The record also indicates that Jackson withdrew his PHRC and EEOC charges before either of those agencies had made a determination. *See id.* at 529, 531 (Deposition of Matthew E. Jackson, Jr.). Jackson did, however, receive right to sue letters from these agencies on November 11, 1984, and December 17, 1984, respectively. Brief for Appellant at 27.

1986). Rule 56 permits a district court to grant a summary judgment motion only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." **Fed. R. Civ. P.** 56(c). A disputed factual matter is a "genuine" issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S. Ct. 2505, 2510 (1986). "Material" facts are those "that might affect the outcome of the suit under the governing law . . . ." *Id.*

> Inferences to be drawn from the underlying facts contained in the evidential sources submitted to the trial court must be viewed in the light most favorable to the party opposing the motion. The non-movant's allegations must be taken as true and, when these assertions conflict with those of the movant, the former must receive the benefit of the doubt.

Goodman, 534 F.2d at 573 (footnote omitted).

In a federal discrimination case such as this one, the governing law includes the "method of . . . presumptions and shifting burdens of production" set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) (*"McDonnell Douglas"),* and its progeny. *Dillon v. Coles,* 746 F.2d 998, 1003 (3d Cir. 1984).

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's [dismissal]." Third, should the defendant carry this burden, the plaintiff

> must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reason, but were a pretext for discrimination.

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (*"Burdine"*) (quoting *McDonnell Douglas*, 411 U.S. at 802); *see generally Robinson v. Lehman*, 771 F.2d 772, 777 n.13 (3d Cir. 1985); *Kunda v. Muhlenberg College*, 621 F.2d 532, 541-43 (3d Cir. 1980).

This Court noted recently, in the context of a federal age discrimination claim, that "a defendant's burden of production as the moving party on summary judgment generally is to show that the plaintiff cannot meet his [or her] burden of proof at trial." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 895 (3d Cir. 1987) (in banc), *petition for cert. filed*, 56 U.S.L.W. 3013 (U.S. July 14, 1987) (No. 86-2007). This burden on the moving defendant is not satisfied, however, "merely by showing the plaintiff's inability to prove by *direct* evidence that the defendant's proffered reason is a pretext for . . . discrimination." *Id.* (original emphasis). At the summary judgment stage, in other words, "all that is required [for a non-moving party to survive the motion] is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve [at trial] the parties' differing versions of the truth . . . ." *First Nat'l Bank of Ariz. v. Cities Servs. Co.*, 391 U.S. 253, 288-89 (1968). Further, because

> intent is a substantive element of this cause of action—generally to be inferred from the facts and conduct of the parties—the principle is particularly apt that courts should not draw factual inferences in favor of the moving party and should not resolve *any* genuine issues of credibility.

Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981) (original emphasis).

III. Appellees' Motion for Summary Judgment

Appellee's motion for summary judgment, which the district court granted, sought judgment in its favor "in all respects." App. at 791. Thus, while the district court's brief opinion is less than clear in explaining the precise claims to which its order applies, we have concluded that the district court entered summary judgment for appellees on Jackson's Title VII and Section 1981 claims concerning his discharge, on his similar federal claims concerning Pitt's processing of his grievance, and on his pendent state claims alleging fraud, defamation and invasion of privacy. We will address these distinct summary judgments in that order.

A. Pitt's Discharge of Jackson

Appellees make no contention that Jackson has failed to establish a prima facie case under the *McDonnell Douglas* method of proof. We note that (i) he belongs to a racial minority; (ii) he was employed as one of Pitt's in-house attorneys and was qualified for that position; (iii) he was discharged from that position; and (iv) his co-workers, who are white, were not discharged. The district court correctly found that Jackson established a prima facie case . *See McDonnell Douglas,* 411 U.S. at 802; *Bellissimo v. Westinghouse Elec. Corp.,* 764 F.2d 175, 179-80 (3d Cir. 1985) ("A plaintiff alleging a discriminatory firing need only show that he [or she] was fired from a job for which he [or she] was qualified while others not in the protected class were treated more favorably . . . . Proof of discharge will establish a prima facie showing in a Title VIi suit."), *cert. denied,* __U.S. __, 106 S. Ct. 1244 (1986). Jackson, in

other words, carried his "initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under [Title VII].' " *Furnco Constr. Corp. v. Waters,* 438 U.S. 567, 576 (1978) (*"Furnco")* (quoting *International Bhd. of Teamsters v. United States,* 431 U.S. 324, 358 (1977)); *cf. EEOC v. Hall's Motor Transit Co.,* 789 F.2d 1011, 1015 (3d Cir. 1986) ("an employer's decision to discharge an employee may superficially appear to be justified by legitimate business reasons and yet [may] have been motivated by racial prejudice").

Under *McDonnell Douglas,* appellees have also fulfilled their ensuing burden of production "to articulate some legitimate, nondiscriminatory reason" for Jackson's dismissal. 411 U.S. at 802. The summary judgment record now before us includes depositions, affidavits, documents and other evidence supporting appellees' position that Jackson "was simply a poor performer," Brief of Defendants-Appellees at 21, who was, accordingly, dismissed from his job.[2]

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[2]At the same time the district court granted appellees' motion for summary judgment, it also denied Jackson's contemporaneous motion for summary judgment. Jackson separately appeals the denial of his summary judgment motion, claiming that, at stage two of the shifting *McDonnell Douglas* burdens, appellees failed to articulate a legitimate, nondiscriminatory reason for their challenged acts. In reality, however, this aspect of Jackson's appeal amounts to a claim that appellees' proffered reasons for terminating him are unsupported by a preponderance of the evidence and therefore are not worthy of credence. *See* Brief for Appellant at 39-46. We conclude that any such assessment must be made by the factfinder at trial; "[a]t the summary judgment stage, 'the judge's function is not . . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' " Equimark Commercial Fin. Co. v. C.I.T. Fin. Servs. Corp., 812

(Continued on next page)

The true dispute in this appeal concerns the third stage of the *McDonnell Douglas* method of proof: Has Jackson introduced sufficient evidence to demonstrate the existence of a genuine issue whether appellees' "proffered justification is merely a pretext for discrimination"? *Furnco,* 438 U.S. at 578. The district court concluded that Jackson's record evidence does not create such an issue; it "f[ound] no evidence of racial animus but on the contrary not[ed] abundant instances of unsatisfactory work performance [by Jackson that Sullivan] might reasonably regard as sufficient cause for discharge . . . ." *Jackson,* No. 85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986).

We reject the district court's conclusion. The record, including Jackson's lengthy deposition, contains more than "a scrap of evidentiary material to support h[is] argument." *Alizadeh v. Safeway Stores, Inc.,* 802 F.2d 111, 113 (5th Cir. 1986). Instead, throughout nearly 700 transcript pages, Jackson's deposition in numerous ways calls into question appellees' claims that Jackson was dismissed for performance deficiencies. Jackson's basic position is that he never received any complaints about—and, indeed, that he was often complimented for—his legal work during his years at Pitt. *E.g.,* App. at 59, 427, 482-84, 527 (Deposition of Matthew E. Jackson, Jr.). Jackson also claims that Sullivan in particular never made specific complaints or gave Jackson "facts about anything," *id.* at 234 (same); that Sullivan, after discharging Jackson, began to solicit complaints about his work by calling "numerous individuals" at Pitt, *id.* at 352 (same); that Sullivan, after discharging Jackson, was seen "walking around the halls like a wild

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(Continued)
F.2d 141, 144 (3d Cir. 1987) (quoting *Anderson,* ___ U.S. at ___, 106 S. Ct. at 2511). Accordingly, we will affirm the district court's denial of Jackson's motion.

man," *id.* at 283 (same), "talking about he was going to ruin [Jackson's] reputation and destroy [him]," *id* at 286 (same); and that Sullivan told Jackson's attorney "that [Sullivan] would ruin and destroy [Jackson,] . . . something to the effect that [Jackson] would never be able to practice law in Pittsburgh again."[3] *Id.* at 360-61 (same). As a whole, such record evidence is more than sufficient to support the reasonable inference that Sullivan's criticisms of Jackson's performance are post hoc concoctions. It also suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he was black. In refusing to draw such obvious inferences, and thus in entering summary judgment for appellees, it appears that the district court "invaded forbidden territory" that is reserved for a factfinder at trial. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied*, 429 U.S. 1053 (1977).

Additionally, as to the substantive legal tasks that appellees allege Jackson mishandled during his years of employment at Pitt, Jackson counters with claims that he was not the lawyer who was responsible for some of the matters in question, App. at 111-12 (Deposition of Matthew E. Jackson, Jr.), and that Sullivan refused Jackson's requests to bring in outside counsel to handle other specialty matters. *Id.* at 546-50 (same). In addition, Jackson claims that he was the only attorney in the office who had no secretary, *id.* at 63-64; 87, 96, 137, 542 (same), and that he alone was denied the assistance of less-experienced legal staff members who were otherwise available. *Id.* at 205-06,

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[3]We also note Sullivan's alleged statement of "hope [that Jackson] doesn't think the black judges can help him." App. at 52a (Deposition of Matthew E. Jackson, Jr.); *see also id.* at 284 (same).

542-44 (same). Such evidence supports the reasonable inference that Jackson was treated less favorably than his white colleagues in ways that could explain any "deficiency" in his performance. *Cf. Bellissimo,* 764 F.2d at 180 (trial court finding that Ms. Bellissimo proved pretext was "clearly erroneous because [she] failed to make any showing of disparate treatment and because [defendant] proved that its male attorneys were treated the same as she in the disputed areas"). It suffices, in short, to raise a genuine issue of fact whether Jackson's dismissal really had anything at all to do with his performance.

We make no claim to believe or to disbelieve Jackson's evidence. That, we emphasize, is wholly the province of the factfinder at trial. *See Bushman,* 798 F.2d at 660 ("While plaintiff's credibility may be challenged by opposing counsel at trial, it is not the function of the court to assume the role of the factfinder upon summary judgment."); *Graham v. F.B. Leopold Co., Inc.,* 779 F.2d 170, 173 (3d Cir. 1985) ("What the district court chooses to infer or chooses not to infer is simply not relevant to consideration of a summary judgment motion."); *Fireman's Fund Ins. Co.,* 540 F.2d at 1178 ("[i]t is the function of the trier of fact alone .... to evaluate contradictory evidence"). We do note, and by reciting the deposition evidence in such detail we mean to demonstrate, however, that a factfinder reasonably could conclude that appellees' position is mere pretext. Jackson's opposition to the summary judgment motion was therefore not based only upon "t[he] bare-bone allegations in h[is] brief and pleadings .... " *Alizadeh,* 802 F.2d at 113; *cf. Sola v. Lafayette College,* 804 F.2d 40, 45 (3d Cir. 1986) (affirming summary judgment where plaintiff "produced no evidence [beyond her allegations] that she was denied tenure in part based on

her gender"); *accord Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1218 (7th Cir. 1980) (per curiam) (affirming summary judgment for employer in age discrimination case where "the subsidiary facts plaintiff put forward as evidence . . . [gave] no indications of motive and intent, supportive of his position, to put on the scales for weighing [-i]t was a wholly empty case"), *cert. denied*, 450 U.S. 959 (1981); *Pierce v. New Process Co.*, 580 F. Supp. 1543, 1546 (W.D. Pa.) (granting summary judgment for employer in age discrimination case where "plaintiff [was un]able to present any facts to indicate pretext or discriminatory intent"), *aff'd*, 749 F.2d 27 (3d Cir. 1984). It was, rather, based upon his own evidence and comprehensive testimony, and was sufficient to withstand the motion for summary judgment. *See J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 617 (3d Cir. 1987) (where "reasonable minds could differ[,] . . . an issue of material fact remains . . . for the trier of fact"); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 732 (9th Cir. 1986) (race discrimination plaintiffs relied upon evidence including "their declarations" to survive employer's summary judgment motion); *Walters v. President & Fellows of Harvard College*, 645 F. Supp. 100, 102 (D. Mass. 1986) (*"plaintiff's contentions* . . . [placed] the underlying facts . . . sufficiently in question that summary judgment is not warranted") (emphasis added).

Appellees' central argument in this appeal—a position that the district court appeared to adopt in granting their motion for summary judgment—is that Jackson's deposition, because it is his only record evidence, is insufficient to create a genuine factual issue on the ultimate question of race discrimination. This position relies upon our decision in *Molthan v. Temple Univ.*, 778 F.2d 955 (3d Cir.

1985), affirming the entry of judgment for the defendant in a Title VII sex discrimination suit. In *Molthan,* "we agree[d] with the district court that no evidence was adduced from which a jury could reasonably have inferred that sex discrimination played any part in the denial of [plaintiff's] promotion," and we concluded that plaintiff's evidence there "was insufficient as a matter of law to warrant any [such] inference . . . ." *Id.* at 962. We did not hold, however,—contrary to appellees' assertions and oral argument before this Court—that a discrimination plaintiff must offer "some evidence other than [his or] her own subjective belief" or "put on at least one other witness other than [himself or] herself" before his or her case will survive motions for summary judgment and/or directed verdict,[4] and we explicitly reject any intimations to the contrary. There is simply no rule of law that provides that a discrimination plaintiff may not testify in his or her own behalf, or that such testimony, standing alone, can never make out a case of discrimination that will survive a motion for summary judgment.

In today's climate of public opinion, blatant acts of discrimination—the true "smoking guns"—can easily be identified, quickly condemned and often rectified in the particular settings where they occur. Much of the discrimination that remains resists legal attack exactly because it is so difficult to prove. Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered. That is one of the reasons why our legal system permits discrimination plaintiffs to "prove [their]

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[4]Although the oral argument has not, to our knowledge, been transcribed, these quotations from appllees' argument were obtained with care from the Court's audio tape.

case[s] by direct or *circumstantial evidence." United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 714 n.3 (1983) (emphasis added); *accord Maxfied v. Sinclair Int'l,* 766 F.2d 788, 791 (3d Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S. Ct. 796 (1986); *Lewis v. University of Pittsburgh,* 725 F.2d 910, 919 n.10 (3d Cir. 1983), *cert. denied,* 469 U.S. 892 (1984). This record, unlike that in *Molthan,* contains both circumstantial evidence and Jackson's direct evidence from which a jury could reasonably infer that Jackson's performance as a lawyer was not deficient, that appellees' claims to the contrary are mere pretext, and that race discrimination played a role in Jackson's discharge.[5] Therfore, because "the issue of pretext turns on [Jackson']s credibility[, it] is not appropriate for resolution on a summary judgment motion." *Chipollini,* 814 F.2d at 901; *accord Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 865 (3d Cir. 1986) (where "record contains more than simple accusations and speculation[,] . . . there is sufficient evidence to put [the employer's] motivation in issue"); *cf. Attorney Gen. of the United States v. Irish People, Inc.,* 796 F.2d 520, 523 (D.C. Cir. 1986) (per curiam) (Bork, Scalia and Gesell, JJ.) ("affidavits from [nonmovant organization's] officers and staff," which "District Court dismissed . . . as conclusory and lacking particularity, . . . were adequate to raise a genuine issue of fact in light of the nature of the Attorney General's evidence and the issue involved").

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[5]This is the record evidence and the inferences drawn therefrom that a court is not, at the summary judgment phase, free to minimize, much less disbelieve. *Molthan,* which was not a summary judgment case, did, by contrast, involve our Court's refusal to credit evidence—allegations that defendants there made a number of sexist comments—that "[t]he district judge did not believe . . . ." 778 F.2d at 962 n.1.

B. Pitt's Handling of Jackson's Grievance

Count II of Jackson's complaint alleges that Pitt, in processing Jackson's grievance, intentionally deviated from the provisions of its *Staff Handbook,* provisions that Pitt had previously represented as applying to all of its employees, and that this deviation itself was racially motivated, in violation of Title VII and Section 1981. *See* App. at 11. Appellees answer, *inter alia,* that Jackson, who held a nonclassified staff position at Pitt, is not covered by the handbook's grievance procedure for classified employees. On appellees' motion for summary judgment, the district court denied Jackson's claim, which it called a "procedural due process" claim, accepting instead appellees' arguement that Jackson is not covered by the *Staff Handbook* procedure.[6] *Jackson,* No. 85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986).

Jackson has not addressed this aspect of the district court's judgment in either of his briefs or in his oral argument to this Court. Accordingly, we conclude that it has not been appealed. *See generally Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,* 755 F.2d 38, 40 n.2 (3d Cir.), *cert. denied,* ___ U.S. ___, 106 S. Ct. 67 (1985).

C. Jackson's Pendent Claims

After disposing of Jackson's federal claims, the district court asserted that it was within "its discretion [to] decline to consider the pendent State claims . . . ." *Jackson,* No.

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[6]The district court found that "the grievance procedure upon which plaintiff relies is applicable only to classified employees whose code numbers appear in a specified list of job titles, which does not include plaintiff's job." *Jackson,* No. 85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986).

85-0264, mem. op. at 2 (W.D. Pa. June 11, 1986). Convinced that these pendent claims "raise[d] no peculiarly difficult or doubtful questions of State law [that] should be reserved for disposition by State courts," *id.*, however, the district court also granted appellees' motion for summary judgment on these claims.

We conclude that this aspect of the district court judgment also has not been appealed. The only reference to these claims is the final words on the final page of Jackson's brief, which asks us to remand "for trial on the pendent state claims." Brief for Appellant at 50. This is insufficient to put the issue before us. *See* **Fed. R. App. P.** 28(a)(2) (appellant's brief must contain a statement of the issues presented for review); *cf. Brown v. Sielaff,* 474 F.2d 826, 828 (3d Cir. 1973) (per curiam) (citing Rule 28 for the proposition that, where the "appellant has not pressed a point in this appeal, we are unable to notice it"). Further, these claims are not addressed at all in Jackson's Reply Brief and were not raised in the course of his oral argument. Accordingly, under the law of this Circuit, he has "waived this issue on appeal." *Delaware Valley Citizen's Council For Clean Air,* 755 F.2d at 40 n.2 (issue "not addressed in appellant's brief, reply brief or at oral argument"); *accord Lugar v. Texaco, Inc.,* 755 F.2d 53, 57 n.2 (3d Cir. 1985); *NLRB v. Wolff & Munier, Inc.,* 747 F.2d 156, 167 (3d Cir. 1984) (Sloviter, J., dissenting); *Battle v. Pennsylvania,* 629 F.2d 269, 271 n.1 (3d Cir. 1980), *cert. denied sub nom. Scanlon v. Battle,* 452 U.S. 968 (1981).

IV. Conclusion

For the foregoing reasons, we will affirm the district court's denial of appellant's motion for summary judgment. We will reverse the district court's entry of summary

judgment for appellees on appellant's federal claims concerning his discharge and remand them for trial on the merits. Costs will be taxed against appellees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MATTHEW E. JACKSON, JR.,
Plaintiff,

v.

UNIVERSITY OF
PITTSBURGH, *et al.*

Civil Action
No. 85-0264

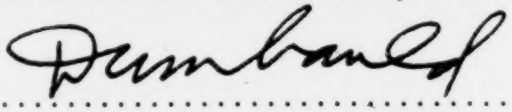
JUDGMENT

AND NOW, this 11th day of June, 1986, upon consideration of cross-motions for summary judgment and of briefs in support thereof and in opposition thereto, and of other affidavits, depositions, and documents of record, after argument; and it appearing that plaintiff's action is for unlawful discharge as assistant counsel of the University of Pittsburgh allegedly because of his race and color, pursuant to 42 U.S.C. 2000e-2(a) ("Title VII") and 42 U.S.C. 1981 [1983] ("Civil Rights"), and denial of procedural due process, together with pendent State claims for breach of contract, fraud, defamation and invasion of privacy; and the Court being of opinion that under the schema of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 804-805 (1973), and its progeny, the crucial issue here is whether defendants' articulated legitimate reasons for discharging plaintiff were pretextual and constituted mere subterfuge; and that plaintiff must ultimately prove that racial reasons were the true motivation for his discharge [*Alexander v. Northern Arizona Counsel of Governments,* 447 F. Supp. 1364, 1367 (D. Ariz. 1978); *Flucker v. Fox Chapel Area School Dist.,* 461 F. Supp. 1203, 1204,

1205 (W.D. Pa. 1978); and the Court finding no evidence of racial animus but on the contrary noting abundant instances of unsatisfactory work performance which plaintiff's supervisor Sullivan might reasonably regard as sufficient cause for discharge under the "new broom" tight-ship regime of high-quality low-cost legal service prescribed by Sullivan as the remedy for Pitt's excessive expenses for legal services formerly paid to down-town law firms (one striking example being plaintiff's lack of diligence in effectuating a bequest to the University where the Dilworth firm of Philadelphia wrote two letters urging completion of the transaction); and the Court finding no denial of procedural due process, since the grievance procedure upon which plaintiff relies is applicable only to classified employees whose code numbers appear in a specified list of job titles, which does not include plaintiff's job; and while the Court might in its discretion decline to consider the pendent State claims, yet they seem to raise no peculiarly difficult or doubtful questions of State law which should be reserved for disposition by State courts; and the Court being of opinion that no contractual action of assumpsit of fraud is established; and that no actionable defamation or invasion of privacy has been shown, the Court being of opinion that it is ordinary prudence to keep a so called "secret file" such as Sullivan did, in order to be prepared for the spate of wrongful discharge cases likely to arise whenever a person of protected race, age, or sex is discharged, or even for any discharge of an employee at will since the decision in *Novosel v. Nationwide Ins., Co.*, 721 F. 2d 894 (C.A. 3, 1983), and that keeping such data is no evidence of wrongful animus or racial discrimination; and the Court being of opinion that the data regarding plaintiff's performance was not disseminated to persons other than those having a reasonable connection either with the

termination process itself or with the climate of opinion on black issues which was appropriately kept informed in order to protect the image of the University and to justify and defend Sullivan's and Posvar's actions against any suspicions or allegations of racism; and that accordingly defendants are entitled to the defenses of non-publication, privilege, or statute of limitations as applicable to the particular statements charged as defamatory or as invading privacy; and the Court therefore being of opinion that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law;

IT IS ORDERED, ADJUDGED, DECREED, AND FINALLY DETERMINED that plaintiff's motion be and the same hereby is denied; that defendants' motion be and the same hereby is granted, and that judgment be and it hereby is entered in favor of defendants University of Pittsburgh, David C. Sullivan, and Wesley W. Posvar, in their official and individual capacities, and against plaintiff Matthew E. Jackson, Jr., each party to bear its own costs and attorney fees.



United States Senior District Judge

APPENDIX C

BUSINESS AND HIGHER EDUCATION
PARTNERS IN PROCESS

Foundation for Applied Science and Technology

December 5, 1983

Mr. David C. Sullivan, Esq.
University Legal Counsel
3201 Cathedral of Learning

Dear David:

Matt Jackson simply is not meeting our requirements for legal support in the operations of the Foundation for Applied Science and Technology. This letter requests immediate relief in the form of temporary retention of outside counsel knowledgeable in securities law and long-term relief in the form of assignment to us of counsel capable of handling our affairs more promptly and skillfully.

Specifically, we have two Research and Development Limited Partnerships which must be processed within the next several days. Follow up on these may continue through most of December. I request that you assign Alan Finegold of Kirkpatrick, Lockhart, Johnson & Hutchison, to provide needed legal counsel in these matters. We also require continuing and *prompt* assistance in working out our Memorandum of Understanding with the University, Confidentiality Agreements, contract documents, etc. To date, our support has been lacking in both responsiveness and precision.

The precipitating events leading to this request include the following:

1) Matt promised the attorneys for Hickey-Kober Inc., the Partnership syndicator, a package of data by, Wednesday, 30 November. That package was finally mailed—incomplete and incorrect—on Friday, 2 December.

Judgments relating to quality of legal services may be subjective, but issues of effort and promptness are not. Matt told me that you had him tied up on another assignment on Friday morning when he arrived here at approximately 11:30 AM for a meeting scheduled for early Friday morning. You have told me this was not the case. His absence during this critical period had a devastating effect on the quality of our preparation.

2) The errors in documentation prepared by Matt for the Hickey-Kober Partnership were numerous and potentially disasterous in consequence. For example; he proposed an option for the Foundation to be exercised if a similar option was not exercised by another party within one year. His proposal had that party notify FAST of its intent not to exercise on January 30, 1985 with FAST required to exercise on January 30, 1985. He also listed the distribution of royalties during one phase of commercial exploitation as

a) Until the net proceeds equal the initial investment of the Limited Partners

   1.) 60% to the Partnership
   2.) 40% to Scopas and FAST in accordance with the provisions of paragraph 7, below

b) Until the Limited Partners receive and additional amount equal to eight (8) times their initial investment

   1.) 3% to the Partnership

2.) 97% to Scopas and FAST in accordance with the provisions of paragraph 7

c) Thereafter, perpetual payments will be made

1.) 1% to the Partnership

2.) 99% to Scopas and FAST allocated in accordance with the provisions of paragraph 7

whereas the correct distribution is

a) 6% of net proceeds until the partners recover their initial investment

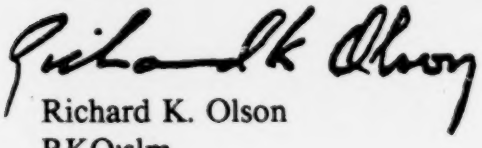
b) 3% of net proceeds until the partners have received a total of eight times their initial investment

c) Thereafter, 1% in perpetuity.

A draft of the document referred to above is attached. Please note that this is not the first draft. It contains several corrections of errors which were contained in earlier drafts, yet there are still errors in items 2, 3, 4, 5 and 7.

Since he has commenced to work on Foundation business, Matt has stated that your assignment of his time to other University business has prevented his concentration on meeting our requirements. I cannot judge the accuracy of these excuses. I do know that we need more prompt and effective legal assistance. The errors of omission and commission of the past week will cost us over $2 million in lost revenues if not corrected immediately.

Sincerely,



Richard K. Olson
RKO:slm
Attachments

No. 87-787

In the Supreme Court of the United States

October Term, 1987

UNIVERSITY OF PITTSBURGH
Petitioner,

v.

MATTHEW E. JACKSON, JR.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Matthew E. Jackson, Jr., Esquire
1017 Fifth Avenue
Pittsburgh, PA 15219
(412) 391-1700
Pro se

QUESTION PRESENTED

Whether a plaintiff, in an employment discrimination action, at the summary judgment stage, must prove only by direct evidence that there are genuine issues of material that the employer's profferred reasons for the adverse employment decision are a pretext to discrimination?

LIST OF PARTIES

Respondent disagrees with Petitioner's attempt to quietly remove David C. Sullivan and Wesley W. Posvar as parties to this action.

1. UNIVERSITY OF PITTSBURGH
2. DAVID C. SULLIVAN
3. WESLEY W. POSVAR

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Cases

STATEMENT OF THE CASE

Petitioners' Statement of the Case is a dishonest and misleading presentation of the record. Therefore, Respondent submits the following Statement of the Case.

Petitioners have unashameably plagarized the dissenting opinion of The Honorable James Hunter III, in Chipollini v. Spencer Gifts, Inc., 814 F2d. 893, 1987.[1] *They reconstructed the facts of this case to fit within the framework of their plagarized argument, necessitating the submission of this correct Statement of the Case, based upon the record, by Respondent.*

Petitioners' argument changes and moves around words, from Judge Hunter's dissenting opinion, and uses his thoughts and ideas, as if they were their own. Eventually, Petitioners, in their lethargic intellectual effort, blatantly stole[2] *verbatim from Judge Hunter's dissenting opinion, two entire pages of language, without bothering to acknowledge Judge Hunter*

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1. Chipollini v. Spencer Gifts, Inc., 814 F.2d. 893, (3rd. Cir. 1987), (9-1 en banc decision), petition for cert. filed 55 U.S.L.W. 3872 (June 17, 1987). The Honorable James Hunter III, senior judge, participated since he was a member of the original panel. Id at 894, footnote 4.

2. The plagarized portion of the petition submitted by the Petitioners begins on page 13, at the top of the page. The following was copied from the opinion. ". . . no genuine issue of material fact remains for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.* U.S. , 106 S.Ct. 2505, 2511, 91 L.Ed.2d. 202, (1986). . . . a judge must "view the evidence presented through the prism of the substantive evidentiary burden" that the party must bear at trial. Anderson, 106 S. Ct. 2513. . . . "the nonmovant will bear the burden of persuasion at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's

(continued next page)

as its true author, and they have the audacity to present it to this court as their own astute, thought provoking argument for the issuance of a writ of certiorari. Throughout their petition, Petitioners go beyond advancing a legitimate argument to a reconstruction of the record to fit their plagarized argument.

FACTUAL BACKGROUND

Respondent is a black citizen of the United States who was recruited by the University of Pittsburgh, (hereinafter "Pitt"), as an attorney in its legal department, on July 15, 1975. Respondent had an excellent employment record at Pitt, prior to his discharge, on January 3, 1984.

During his eight and one half years of employment at Pitt, Respondent was responsible for providing legal services to the various departments at Pitt on matters of a business-corporate nature and for monitoring the conduct of litigation being handled by outside legal counsel. Respondent's similarly situated coworker, Ronald Talarico, a white male, was

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burden of proof at trial. See *Celotex Corp. v. Catrett*, U.S. , 106 S.Ct. 2548, [91 L.Ed.2d 265] (1986)." In an [ADEA] action, the plaintiff has the burden of persuasion on the issue of discriminatory intent . . . Furthermore, the plaintiff must persuade the jury not only that the defendant's proffered explanation is "a pretext for unlawful discrimination" . . . it is the plaintiff who must prove discrimination; the defendant is not required to prove the absence thereof. See *Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 99 S.Ct. 295, 58 L.Ed. 2d 216 (1978)(per curiam) . . . An employer motivated by ill-will, nepotism or unpublicized financial problems in his termination of an employee is just as likely to use a pretextual explanation for his action as is an employer motivated by statutorily-prohibited discrimination. Employers may even resort to pretext for benign reasons, such as the desire to spare the feelings of a loyal employee whose competence has declined. *Chipollini v. Spencer Gifts, Inc.*, supra at 902-903.

hired in 1977 and was responsible for providing legal services to Pitt departments on matters involving faculty, students and employment discrimination. Each attorney dealt directly with the department for which the legal service was being performed.

From its inception in July 1975, the department was supervised by William Hannan, a white male, until Hannan left Pitt at the end of December 1982. Hannan's specialty was labor law. The department had two secretaries, both white. One secretary was assigned to Hannan and Respondent and the other was assigned to Talarico. Talarico and Respondent were allowed to devote up to twenty percent of their time to their private practices.

Hannan became a private labor arbitrator. He became increasingly more involved with his arbitration practice and began to spend greater amounts of time out of the office at arbitrations. When in the office, he spent large amounts of time writing arbitration opinions. During those periods when Hannan was away from the office, Respondent oversaw most of the operations of the department, although he and Talarico performed their jobs independently. *(Record on appeal p. 70).*

In 1980, Talarico, with Hannan as his mentor, also became a private labor arbitrator. He, too, began spending much of his time doing arbitration work. The secretaries became increasingly more involved in typing Hannan's and Talarico's labor arbitration opinions. In fact, Pitt work was set aside so those opinions could be typed. *(Record on appeal pps. 70, 736).*

By 1982, Hannan's and Talarico's arbitration practices kept both of them out of the office for long periods. When they

were in the office, the secretaries were burdened with typing their arbitration work. Respondent was left with an overwhelming amount of Pitt work and without a secretary who could readily type his work, between typing Hannan's and Talarico's arbitration opinions and their other duties. The secretaries were, by then, totally running the student loan collection program, except for courtroom appearances. Finally, during 1982, Hannan's and Talarico's inattentiveness to Pitt affairs began to concern Pitt's administration. *(Record on appeal pps. 78-84).*

Pitt's Chancellor Wesley W. Posvar asked the Dean of Pitt's School of Law, John Murray, to review the operations of the legal department. After conducting that review, Dean Murray recommended that there be a change in the leadership of the legal department and that the attorneys devote all of their time to Pitt business. Dean Murray, in a letter to Respondent, praised his efforts and accomplishments on behalf of Pitt. Hannan left Pitt in late December 1982.

On January 3, 1983, Hanan was replaced by David C. Sullivan, a white male. Respondent continued his responsibilities. Talarico was now responsible for student loan collections. [In 1981, Pitt had created a new department, the Office of Employee Relations, which had taken a number of responsibilities away from Talarico]. *(Record on appeal 706-710).*

When he arrived at Pitt, although Sullivan took little interest in Respondent's legal work for Pitt, he was often rude or attempted to belittle Respondent. *(Record on appeal 41-53, 59-62, 199, 234-236).*

In March of 1983, Respondent was given a 17% salary increase to forego any private practice. Although Respondent was required to relinquish his private practice, Talarico, who

was also given a large salary increase (30%) was allowed to continue his practice. Both attorneys received another salary increase in July 1983. *(Record on appeal 591, 613-616).*

During the spring of 1983, Respondent learned from reading an article in the student newspaper, the "Pitt News", that Talarico had been appointed Assistant Secretary of Pitt's Board of Trustees. As time went on, Talarico became Sullivan's constant companion. When they were in the department's offices, they were constantly in each other's offices. Although attempts were made, by Respondent, to familiarize Sullivan with his work, Sullivan always refused to discuss Respondent's work. The departments at Pitt usually bypassed Sullivan and dealt directly with respondent. *(Record on appeal 509, 634).*

Sullivan hired another attorney, a white female named Patricia McCullough. she began her employment at Pitt in May or June 1983. She was assigned, by Sullivan, as an assistant to Talarico. Eventually, she took over the student loan collections. She also worked closely with Sullivan on several projects during 1983, although Sullivan got involved in few projects.

In late June or early July 1983, Sullivan hired another attorney, Judy Frank, a white female. She was also assigned to Talarico. Respondent continued to maintain his responsibilities for business-corporate legal matters for Pitt. Although Respondent requested that one of the new attorneys be assigned to assist him, on a number of occasions, Sullivan told Respondent that he would not ever be provided with any assistance.

On July 18, 1983, Respondent became ill at work one afternoon with a severe earache and facial paralysis that his doctor diagnosed as Bell's palsy. The condition made it neces-

sary for Respondent to be off from work for two and one half days. Each morning when Respondent called off from work, Sullivan would get on the telephone and harass him about returning to work. On July 22, 1983, Respondent spoke, by telephone with Sullivan, who was extremely agitated by Respondent's absence. Respondent, with a temperature of 104°, went to work on that Friday, because of Sullivan's attitude towards him. When Respondent arrived at the office, Sullivan handed him a fifty page contract, which had just been received for review, to revise over the weekend. *(Record on appeal 119-125).*

There were some small matters which arose, requiring the attention of another attorney, during Respondent's absence. Most of the work of the office seemed to collapse, during Respondent's short absence, because Respondent was doing most of the substantive legal work in the office and was not permitted to have any assistance or backup on any of the work that he performed.

Although McCullough had only started to work at Pitt in May or June 18, 1983, she had taken a vacation by July. Sullivan also sent her out of town, to a seminar, so that she could visit her sister. Frank started to work in the department in late June and immediately took a vacation. Talarico also took a vacation in June. Sullivan took a month's vacation, during the spring of 1983 and, when he returned, he took a great deal of time off to go to Florida, for personal reasons. When Respondent's white coworkers were at work, they appeared to have little to do.

There were now three secretaries in the office. Respondent shared a secretary, with Sullivan, who also had to administer the office because Sullivan was seldom there. Talarico had a secretary and McCollough and Frank shared a secretary.

A number of Pitt's departments relied solely upon Respondent for legal advice because none of the other attorneys had developed a rapport with the departments of Pitt. Respondent worked on all real estate matters, tax matters, insurance matters, campus police matters, confidential matters for the senior staff, or business and finance matters.

Sullivan was rarely in the office. Talarico often left early to attend arbitrations. McCullough came to work when, and if, she felt like. Frank read the newspaper most afternoons. Respondent was the only employee in that office who was scrutinized by Sullivan and required to be constantly busy. Respondent was usually singled out for unkind remarks at staff meetings. No other employee was subjected to that kind of treatment by Sullivan.

Respondent prepared a detailed memorandum of his work for Sullivan when he took a two week vacation (from August 8, 1983 to August 23, 1983) so that Sullivan would be able to respond to inquiries in Respondent's absence. Upon returning from vacation on August 23, 1983, Respondent found, on his desk, a five page memorandum, from Sullivan, containing unnecessary, unfounded and fabricated criticisms of Respondent's work. Sullivan had taken Respondent's outline of his work and used it to fabricate petty criticisms. Sullivan had little or no first hand knowledge of the matters complained about. *(Record on appeal 84-208, 794-796, 781, 802-806).*

The memorandum criticized Respondent because a coworker hadd received a telephone call for him concerning a project or projects of his, while he was sick or on vacation and on projects of which Sullivan had only a superficial knowledge and of which Sullivan had little or no grasp of the facts.

Sullivan constantly criticized Respondent for things others in the office would not be criticized for and expected Respondent to handle all of his work alone. After reading Sullivan's August 15, 1983 letter, Respondent replied with his letter of August 23, 1983 attempting to respond to the numerous fabrications, innuendo and needless criticism.

From September through December of 1983, the legal department's offices were being extensively remodeled and it became very difficult to work in that area. Respondent found temporary space in another office during the time the remodeling took place. The other attorneys in the department did not spend much time at work.

In September of 1983, Respondent had replaced Sullivan, as the general counsel for the Foundation for Applied Science and Technology, (hereinafter "FAST"). FAST was a corporation, formed by Pitt in 1983, for the purpose of commercializing its research ideas into profit making ventures. Its president was Richard K. Olsen. Sullivan had been asked to resign, as the general counsel of FAST, because he had not begun work on any of the projects that had been assigned to him and FAST had generally become dissatisfied with Sullivan.

There were several research projects for which FAST was seeking investors. Respondent's FAST responsibilities became time consuming and he continued to be totally responsible for all of his other work, as well. Respondent's work with FAST also required him to commute from Pittsburgh to New York City, on a number of occasions, to meet with the attorneys who were putting together the general limited partnership of investors for the research projects.

Respondent was also assigned, by the Chancellor of Pitt, as the legal counsel for a trust fund, administered by Mellon

Bank, from which Pitt's senior administrators would frequently borrow, at a 3% rate of interest and repay interest only during their employment at Pitt, funds for their personal use. That work was performed outside Sullivan's office because neither Sullivan, nor his predecessor Hannan, were trusted by the senior administrators at Pitt. These senior administrators usually hired their own attorney to represent them when entering into the various agreements with Pitt for repayment of these low interest loans.

In November of 1983, Sullivan, a senior staff member, applied for a loan from the trust fund. Sullivan came to Respondent, stated that he was having difficulty, and asked Respondent to assist him in closing on his residence. While at the closing, held in December 1983, Sullivan telephoned his bank and got into an argument with someone at the bank. The bank refused to release the funds, which Sullivan planned to use to remodel his new residence. The closing was delayed, pending resolution of Sullivan's dispute with the bank. Respondent interceded, on Sullivan's request, and the bank released the funds. The closing was finalized the following day. *(Record on appeal 268, 659).*

In December of 1983, Pitt hired a new provost who wanted to borrow funds from Pitt's low interest trust fund as soon as he found a residence. The provost found a house, a closing was held on December 20, 1983 and was attended by Sullivan and Respondent, without a problem.

Respondent, like most employees at Pitt, was off work, during the Christmas holidays, from December 21, 1983 to January 3, 1984. On January 3, 1984, Respondent returned to his newly remodeled office in the department for the first time, in three months, since the renovations had just been com-

pleted. Shortly after 5:00 P.M., while Respondent was in his office working, Sullivan asked Respondent to come to his office. All of the other employees in the office had left for the day. Sullivan told him to hand over his keys and I.D. card. Sullivan spoke arrogantly and joked about firing Respondent. Sullivan told Respondent not to return to the office and that he would be paid until the end of March 1984. *(Record on appeal 218-222, 652-655).*

On January 9, 1984, Respondent filed a formal grievance with regard to his discharge, in accordance with established, published Pitt procedures. The grievance was delivered to the chancellor, in accordance with those procedures, who turned it over to Sullivan to handle. Upon receiving the grievance from Respondent's attorney, Sullivan angrily told him that he would ruin Respondent's career. Respondent, on January 12, 1984, received a confusing letter from Sullivan stating that Respondent would be paid until the end of March 1984 and that Respondent was a "non-classified" employee who was not covered by Pitt's published grievance procedure. Sullivan's "non-classified" category of employee was a subterfuge.

On January 28, 1984, the black female attorney that Sullivan had quietly hired on December 21, 1983, began to work in the department. She had never previously practiced law, but had worked in an administrative capacity for an aquaintance of Sullivan. Respondent's duties were divided among the attorneys in the department who were all given salary increases because of the sudden tremendous increase in the workload of the department.

Following Respondent's discharge, or even perhaps prior thereto, Sullivan began disseminating to employees of Pitt, who Sullivan called "black opinion leaders", documents

which he indicated supported his discharge of Respondent. Most of the documents, in the file which Sullivan disseminated, had not been seen by Respondent because Sullivan had written them to "File", without Respondent's knowledge, and had concealed the documents from Respondent. Respondent heard from other employees about the file, but had no idea what was contained in the file until discovery was conducted in the instant action. On February 10, 1984, Respondent went to Pitt and reviewed his personnel file, but found nothing adverse in the file. *(Record on appeal 686-694, 794-842).*

Sullivan also became quite vocal in attacking Respondent's competence as an attorney, making disparaging remarks about his abilities, as an attorney, to just about anyone who would listen to him. Sullivan made remarks, e.g. "He screwed up my closing"; "He [respondent] screwed up Benjamin's [the new provost] closing". Even Sullivan's supervisor, Wesley Posvar, made a public statement to black employees that Sullivan had reasons to discharge Respondent.

On February 18, 1984, Respondent received another certified letter from Sullivan. This letter told Respondent that, if he did not withdraw his grievance, he would not be paid through March 1984. On February 28, 1984, Talarico notified Respondent's counsel, that Respondent's medical benefits had been terminated on February 28, 1984. On February 28, 1984, Pitt went into Respondent's bank account and removed his February paycheck. Respondent, although he attempted, never had a grievance hearing.

On March 28, 1984, Respondent filed charges of employment discrimination with the Pennsylvania Human Relations Commission, (hereinafter "PHRC"), and Equal Employment Opportunity Commission, (hereinafter

"EEOC"), against Pitt. On November 11, 1984, Respondent received, after requesting, a Notice of Right to Sue letter from the PHRC. Respondent received a Right to Sue letter from EEOC on December 17, 1984. This suit was filed on February 1, 1985.

During discovery, Petitioners took over 1000 pages of Respondent's deposition testimony. Respondent took the depositions of David Sullivan, Ronald Talarico, Judy Frank and Wesley W. Posvar.

During his deposition, Sullivan appeared without any of the files which Pitt contends support their reasons for discharging Respondent. Sullivan could not recollect any of the facts relating to the reasons why he discharged Respondent or what is the meaning of any of the letters, including the one Petitioners have attached as Appendix C to their petition, contained in his personal file on Respondent. Respondent requested production of those files and Petitioners claimed attorney-client privilege.

Sullivan could not cite one instance to support his "evaluation" of Respondent's work performance. He testified that he did not make written evaluations of the attorneys in the office, but he had a secret file on Respondent. Sullivan criticized Respondent harshly for allegedly missing one (1) appointment during the entire year. He didn't know what the appointment was about. He had simply overheard a secretary tell Respondent that someone had called and wondered where he was. But, he stated that he and the other attorneys in the office have also missed appointments.

Sullivan testified that Respondent could only handle the simplest of matters. Yet, Sullivan testified that the legal department could not complete a sizable transaction because Respondent was on vacation, eventhough Respondent had

explained the project, in writing, prior to going on vacation.

Sullivan testified that Respondent was a non-classified employee. Yet, Sullivan could not explain what he meant by "non-classified" nor show any document that used the word "non-classified".

Sullivan testified that people complained about Respondent's work, but could not remember any complaints he received.

Sullivan testified that he tried to rehabilitate Respondent and solicited the assistance of Pitt's Office of Affirmative Action. It is unclear how the Office of Affirmative Action rehabilitates attorneys unless there is some nexus between race, or other protected class of employee, and the performance of the attorney. *(Record on appeal 565-702).*

Sullivan was terminated by Pitt on March 31, 1985. *(Record on appeal 566, 766-767).*

SUMMARY OF ARGUMENT

I. The decision of the United States Court of Appeals for the Third Circuit in the instant case is consistent with the rulings of the United States Supreme Court in *Furnco Construction Corporation v. Waters*, 438 U.S. 5677 (1978); *McDonnell Douglas v. Green*, 411 U.S. 792, (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, (1981); and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983).

II. Petitioners have grossly distorted the record evidence and the decision of the United States Court of Appeals in *Chipollini v. Spencer Gifts*, 814 F. 2d. 893, 3d Cir. 1987) and the instant case.

III. Respondent has presented evidence which is more than sufficient to raise genuine issues of material fact so as to preclude summary judgement.

IV. The decision of the United States Court of Appeals for the Third Circuit does not conflict with the decisions of other courts of appeals.

REASONS FOR DENYING THE WRIT

I. The Decision of the United States Court of Appeals for the Third Circuit Is Consistent With The Rulings of the United States Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792, (1973) and Its Progeny

A review of the record, in the instant case, shows that there are genuine issues of material fact. In *McDonnell Douglas v. Green*, supra at 802, this court set forth the burdens of proof in individual employment discrimination cases. First, the plaintiff has the burden of proving, by a preponderance of the evidence, a prima facie case of discrimination.

Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's rejection.

Third, should the defendant carry this burden, the plaintiff must then have the opportunity to prove by a preponderance of the evidence that the legitimate reason offered by the defendant were not its true reasons, but were a pretext to discrimination. See also *Texas Department of Community Affairs v. Burdine*, supra.

Petitioners did not dispute whether Respondent established a prima facie case in their arguments before the courts

below. They allude to the issue on page 5 of their petition, but do not clearly address the question. All that the party alleging a discriminatory firing need show is that he was fired from a job for which he was qualified, while others not in the protected class, were treated more favorably. *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F2d. 1393, 1395, (3rd. Cir. 1984). See also *Bellissimo v. Westinghouse Electric Corp.*, 764 F2d. 175, (3rd Cir. 1985). Respondent was qualified for the position, which he had performed for eight and one half years, and he was discharged while his white coworkers were retained.

The court found that Petitioners had met their "ensuing burden of production to articulate some legitimate, nondiscriminatory reason" for Jackson's dismissal. *Jackson v. University of Pittsburgh*, et al., 826 F.2d. 230, 233-234, (3rd. Cir. 1987).

Respondent contended that Petitioners had not met their stage two burden of production because they did not dispel the adverse inference of discrimination by producing legitimate, nondiscriminatory reasons for his discharge. Petitioners had simply entered into evidence letters written by Sullivan and meaningless exhibits and left open any inference that may support evidence of deficiencies in Respondent's job performance. Petitioners failed to provide sufficient evidence to frame the factual issues so that Respondent would have a full and fair opportunity to demonstrate pretext. Petitioners reasons were not worthy of credence. See *Texas Department of Community Affairs v. Burden*, 450 U.S. 248, (1981). The court, however, concluded that such an assessment must be made by the factfinder at trial. *Jackson v. University of Pittsburgh*, et al, supra at 234.

At the third stage, the Third Circuit did not shift the bur-

den of persuasion to the defendant, notwithstanding Petitioners argument that it did. see Petition p. 9. The defendant's burden is to show that the plaintiff cannot meet his (or her) burden of proof at trial. *Chipollini v. Spencer Gifts*, supra at 895. The plaintiff continues to have the burden of persuasion after the defendants satisfy their burden of production of evidence of legitimate non-discriminatory reasons. The plaintiff must provide persuasive proof of unlawful intent in order to prevail. Such proof may consist simply of evidence that the reasons proffered by defendants are simply not credible. *Texas Department of Community Affairs v. Burdine*, at 255, n. 10

There is no conflict between the Third Circuit's interpretation of the evidentiary burdens which must be met in a discrimination case in order to survive a motion for summary judgement and the rulings of the United States Supreme Court. There was evidence offered to establish a connection between the discharge and the racial motivation for the discharge. The court found:

> "The record, including Jackson's lengthy deposition, contains more than a scrap of evidentiary materials to support h[is] argument. (citing *Alizadeh v. Safeway Stores, Inc.*, 802 F.2d. 111, 113 (5th. Cir. 1986). Instead, throughout nearly 700 transcript pages, Jackson's deposition in numerous ways calls into question appellees [petitioners'] claims that Jackson was dismissed for performance deficiencies." *Jackson v. University of Pittsburgh*, et al, supra at 234.

Citing the record at 59, 427, 482-484, 527, 234, 352, 283, 286, 360-361, 11-12, 546-550, 63-64, 87, 96, 137, 542, 205-206, 542-544, the court found that the record evidence was:

" . . . more than sufficient to support the reasonable inference that Sullivan's criticisms of Jackson's performance are post hoc concoctions. It also suffices to support an inference that Sullivan orchestrated a campaign to get rid of Jackson because he was black." *Jackson*, supra at 234.

Contrary to Petitioners' argument, the Third Circuit did not hold that no nexus need be shown. See Petition p. 8-17.

II. Petitioners Have Grossly Distorted The Record Evidence And The Decision Of The United States Court of Appeals in *Chipollini v. Spencer Gifts*, 814 F. 2d 893, 3rd Cir. 1987).

Petitioners misrepresent Respondent's contentions and the record evidence when they argue that Respondent "was merely second guessing his employer's evaluation", "tendered self-serving statements" and "none of Jackson's evidence linked his discharge to race, either directly or indirectly". see Petition pp. 15-16. Petitioners assert in their petition that Respondent "suffered from at least . . . [twelve] deficiencies . . ." see Petition, footnote 1.

Respondent did not merely second guess Sullivan's evaluation with self serving statements. The record will show that, in approximately 1000 pages of transcript, Respondent produced evidence to establish that Sullivan and Pitt had fabricated the reasons for his discharge. The court found that "a factfinder reasonably could conclude that appellees' [petitioners'] position is mere pretext. *Jackson v. University of Pittsburgh*, et al. at 235.

Petitioners' argument is that the employer need only announce the reasons for the discharge, at some point in time when they decide what the reasons will be, either before or

after discovery is complete, as they prepared their motion for summary judgment. If the reasons sound legitimate and non-discriminatory, Petitioners argue that the plaintiff cannot challenge those reasons because he is merely second guessing the sound business decision of his former employer.

Petitioners argument is, essentially, that, in an employment discrimination case, all inferences should be resolved in favor of the moving party, if the moving party is the employer and the employee should not be allowed to dispute the employer's proclaimed reason for the discharge, without direct evidence of discrimination. The court, nevertheless, held that defendants' burden of production is not met by "merely showing that the plaintiff's inability to prove by direct evidence that defendant's proffered reason is a pretext for discrimination". *Jackson v. University of Pittsburgh*, et al at 233 citing *Chipollini v. Spencer Gifts, Inc.* 814 F.2d 893, 895 (3rd. Cir. 1987).

The majority in *Chippolini*, supra at 895 held that:

> ". . . the plaintiff is entitled to show that the employer's explanation was pretextual by proffering evidence which is circumstantial or indirect as well as that which shows directly discriminatory animus (smoking gun)."

III. Respondent Has Presented Evidence Which Is More Than Sufficient To Raise Genuine Issues Of Material Fact So As To Preclude Summary Judgment.

Summary judgment is inappropriate if the issues depend upon the credibility of witnesses which can best be determined only after the trier of fact observes the witnesses. *Tunis Brothers Company v. Ford Motor Company*, 763 F.2d 1482, (3rd. Cir. 1985). A review of the record in the instant case will show that there are genuine issues of material fact. Petitioners' Appendix C to their petition raises genuine issues of

material fact. *(Record on appeal 815-819, 411-416)*

There is genuine evidence which calls into question Sullivan's motivation for criticizing Respondent's work performance and Pitt's discharge of him. Sullivan could not present one factual instance to support his "evaluation" of Respondent.

Rule 56 must by construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis. *Slaughter v. Allstate Insurance Company*, 803 F2d 857, infra at 860 citing *Celotex Corp. v. Catrett*, 106 U.S. 2548, 1986).

The Third Circuit, like every circuit cited by Petitioners, in ruling on a motion for summary judgment "does not assume the role of factfinder". It is the function of the factfinder alone . . . to evaluate contradictory evidence". *Jackson v. University of Pittsburgh*, et al, supra at 235; App. A at 10a, citing *Firemans' Fund, Inc. v. Videfreeze Co.*, 540 F.2d. 1171, 1178, (3rd Cir. 1976), cert. den. 429 U.S. 1053 (1977).

IV. The Decision Of The United States Court Of Appeals for the Third Circuit Does Not Conflict With The Decisions Of Other Courts Of Appeals.

Petitioners, on page 7 of their petition, misquote the court in *Chipollini*, at 898, by stating that a plaintiff [in the third circuit] can survive summary judgment "without presenting evidence specifically related" to race. The correct quote is "Thus, in addition to establishing his prima facie case by indirect proof, a plaintiff can prevail by means of indirect

proof that the employer's reasons are pretextual without presenting evidence specifically relating to age. Petitioners failed to mention the court's requirement of indirect proof, although they do include "indirect proof" in their footnote 6 on page 7 of their petition.

Throughout the remainder of their petition, Petitioners repeat their misstatement of the court in *Chipollini*.

Petitioners cited a number of cases which they claim are inconsistent with the holding of the Third Circuit, in this case.

Dea v. Look, 810 F.2d 12 (1st. Cir. 1987), was an age discrimination case in which the plaintiff, the fifty eight year old airport maintenance supervisor, was discharged for converting fuel to his personal use, giving improper instructions to those he supervised and withholding information from the airport manager.

The court entered summary judgment for the employer because the employer articulated a plausible, nondiscriminatory reason for treating Dea different from the other employee who had taken fuel for his personal use. Dea, when pressed at his deposition, about the reason for his discharge, admitted taking the fuel and did not assert "age" as a reason for his discharge. Dea alleged "unionization" and "coverup [for some misdoing] by higher officials" as the reason for his discharge. The court held that ". . . evidence contesting the factual underpinnings of the reason for the discharge proffered by the employer is insufficient, without more, to present a jury question.", *Dea v. Look*, supra at 15.

Slaughter v. Allstate Ins. Co., 803 F2d 857, (5th Cir. 1986), was an age discrimination case in which the plaintiff, an insurance sales agent, was fired for backdating an insurance policy. Slaughter admitted backdating the effective date

of an insurance policy and pointed to nothing other than a conversation, during an investigation, in which he admitted making the change to show that the reason for his discharge was pretextual.

Dale v. Chicago Tribune Co. 797 F2d. 458, (7th Cir. 1986), was an age discrimination case in which the 55 year old plaintiff failed to establish a prima facie case because of a questionable employment history. Id at 465.

Clark v. Huntsville City Bd. of Ed., 717 F2d. 525, (11th Cir. 1983) did not involve a ruling on a motion for summary judgment, but was a trial on the merits. Clark had sued for not being promoted and the court found that there was no "proof of a discriminatory motive". The court noted:

> "We stress that our opinion does not preclude the trial court from basing its finding of a racially discriminatory purpose on circumstantial evidence, including the defendant's failure to rely on the reasons on which it claimed to rely. We state merely that the plaintiff must in fact persuade the court that the defendant acted with a discriminatory purpose." Id at 529, footnote 5.

There is no conflict in the circuits.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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